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PREME COURT, U. S.

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IN THE

# Supreme Court of the United States

No. 736

OCTOBER TERM 1968

ADKINS TRANSFER COMPANY, INC.,
ADKINS CARGO EXPRESS, INC., and
TENNESSEE CARTAGE COMPANY, INC.
Appellants,

vs.

HAROLD DORNBOS and BEVERLY DORNBOS,
Individually and d/b/a H. J. DORNBOS, &
BRO., a Co-Partnership
and
THE KROGER COMPANY and ROOKS
TRANSFER LINES, INC.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

## MOTION TO DISMISS APPEAL

(For List of Attorneys, see Inside Front Cover.)

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

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Appellee moves the Court to dismiss the appeal herein on the following grounds:

## NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL

### I. THE APPELLANT CLAIMS THE IMPOSITION OF IN PERSONAM JURISDICTION OVER APPELLANTS VIOLATES DUE PROCESS OF LAW REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants claimed they would be denied the due process of law if they are subjected to the jurisdiction of Michigan Courts because they do not have minimum contacts with the forum state.

Appellants contends that their only connection with the state of Michigan was through the acceptance of Michigan products in Chicago, Illinois, from another common carrier. (Appellants' Jurisdictional Statement p. 15). Appellant Tennessee Cartage Company claims its only connection was its acceptance and delivery of the interstate shipment of fish locally, and Nashville. (Appellants' Jurisdictional Statement p. 15).

The basis for exercising jurisdiction of Michigan Courts over the appellants was stated in the Michigan Court of Appeals' Opinion appearing in Appendix B of Appellants' Jurisdictional Statement, page 27. The statutory basis is found in Michigan Compiled Laws Supplement 1961, 600.-715 (Mich Stat Ann 1962 Rev §27A.715) which provides as follows:

> "The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such court to render personal judgment against such corporation arising

> out of the act or acts which create any of the following relationships: * * *
>
> (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort."

It was found by the trial court and affirmed by the Court of Appeals that the act of accepting Michigan products and shipping them were of such a quality and nature that the assertion of limited personal jurisdiction over the appellants would not violate due process.

Appellants in their Jurisdictional Statement, page 6, state as follows:

> "No question was raised concerning the jurisdiction of the Court over the subject matter of the action, the fact of proper service of process or the validity of the service of process insofar as it afforded the appellants reasonable notice and opportunity to be heard."

It is therefore reasonable to assume that appellants do not contend that a violation of due process will arise because they were not given proper notice or an opportunity to defend. The argument would be, instead, that due process would be violated because they must appear in a Michigan Court.

The decisions of this court and case law throughout the United States interpreting various "long-arm statutes" make it clear that the Michigan statute does not violate due process of law.

Appellants provide a service. This service enters the stream of commerce as surely as any product enters the stream of commerce. Negligent performance of these services could most reasonably be foreseen to have repercussions

or consequences in states other than where the service is performed. Appellants acted as connecting carriers. They accepted goods F.O.B. from Michigan to Kroger in Tennessee. The service is not one of merely transporting goods within a limited territory but it is a service that must be viewed in the over all context of the function of this service. The function of this service was to transport plaintiff's product from Michigan to Tennessee. Appellants should be answerable for any negligent acts in the transporting of the goods.

Appellants cannot argue that they could not know, or could not reasonably be expected to know, that their acts, if wrongful would have potential consequences in Michigan. The appellants could reasonably be held to foresee that their acts might result in an injury or damage in the state of Michigan.

The Michigan "long-arm statute" was not enacted without considerable deliberation and thought on the part of our legislature. Other jurisdictions and other courts have analyzed similar problems and similar statutes and have held them to be constitutional.

The law is quite clear in this area and certainly does not present a substantial constitutional question.

Aside from the fact that the clear language of the Statute indicates that the appellants are subject to the jurisdiction of the Courts of this State, recent case law indicates that specific legislative authority is not necessary to enable courts to exercise jurisdiction over non-residents and is only limited by due process.

In *St. Clair v. Righter,* 250 Fed Supp 148 (W.D. Va., 1966), it is pointed out by the Court that Virginia's Long Arm Statute requires additional factors other than simply a tortious injury to confer limited *in personam* jurisdiction

over the appellants. However, the Virginia court clearly indicates that:

> "A long arm statute is merely legislative approval for the exercise by the courts in that state of their inherent jurisdictional power *at least* to the limits set out in the statute. It goes without saying that the mere fact that the legislature has passed a statute does not permit an extension of jurisdiction beyond the due process limits even if authorized by the legislation. Conversely, if the limits of the state jurisdiction as set out in the statute fall well within the scope of due process, this does not *restrict* the courts and prohibit them from extending their jurisdiction to the limits of due process even if such an assumption of latent power is not expressly authorized by statute. This necessarily follows from the fact that jurisdiction is a question of power which is ultimately defined by due process and not by state legislation" (p. 152).

Michigan has the legislative authority to assert limited *in personam* jurisdiction over appellants. C L S 1961, §600.715 (Stat Ann 1962 Rev §27A.715). The statute clearly indicates that the appellants are included. No acts need be done by the appellants in the State and, by the clear wording of the Statute, it is not essential that the appellants "purposely avail" themselves of the privilege of conducting activities within this State.

It is the position of the appellee Kroger that the Statute covers the instant situation and even if it does not, the inherent power of the courts to exercise jurisdiction would extend to the appellants under the fact situation as presented.

The appellants admit that acts of negligence resulting in injury to the plaintiffs occurred in Nashville (Appellants' Brief, Michigan Court of Appeals, p. 21).

The Michigan "long arm" Statute clearly makes these acts or act by appellants one of the bases for subjecting them to limited *in personam* jurisdiction of the Michigan Courts.

Although the appellants allege the extent of the injuries suffered are not sufficient to subject them to Michigan law, the material factor for consideration is not the extent of the injuries, but the fact that the defendant-appellants caused consequences to occur which resulted in an action for tort.

It is essential for the existence of judicial jurisdiction that the cause of action arise out of the act done, or the consequences of an act or acts occurred, in the state. This condition is present in the instant case. The defendants-appellants are not being asked to defend themselves because of single, isolated acts, unrelated to the present cause of action. Their acts caused the consequences; namely, the injuries alleged by the plaintiff herein, and these consequences are the bases for bringing the cause of action against the defendants-appellants in the Courts of Michigan. *Nationwide Motorist Association of Michigan v. Nationwide Motorist Association,* 244 F Supp 490, 493 (D.C. Mich., 1965).

Due process would not be violated if the appellants are required to defend themselves in a limited *in personam* action in the state wherein a tortious injury has already resulted from acts or omissions caused by the appellants.

The State of Michigan has a great interest in, and significant contacts with this situation, making it reasonable to assert personal jurisdiction over these defendants.

Interposing "Michigan" in the place of "Virginia" in the statement made by the court in *St. Clair v. Righter,*

*supra,* the following can be found equally valid in this state:

> "(Michigan) as the forum state place of injury can quite validly desire to fix the measure of protection to which each person injured within the state is entitled against his fellows and determine whether the damage was wrongfully inflicted, thus giving rise to a cause of action in tort. This interest is rendered even more substantial by the fact that the plaintiff in this case is a domiciliary of (Michigan)." (p. 154)

Recent cases indicate the jurisdiction test to be applied in determining the *proper forum* will be a consideration of the most convenient forum. *Metal Matic, Inc. v. Eighth Judicial District Court,* 415 P 2d 617 (1966 Nevada).

It would not be unfair or a violation of due process to subject the defendants-appellants to limited *in personam* jurisdiction in this case, since it is a substantial probability that under a conflict of laws rule, that the law of Michigan would be applied in this case, regardless of where the suit was brought. Generally, the law of the place of the injury governs the right of action for a tort, regardless of where the act or omission takes place. *Atkins v. Jones & Laughlin Steel Company,* 258 Minn. 571 (1960), 104 NW 2d 888, 892, 893; citing *Restatement of Torts,* "Conflict of Laws," sections 377-378.

This factor alone would be sufficient contact so as to uphold the court in the exercise of *in personam* jurisdiction in this matter. *St. Clair v. Righter,* 250 Fed Supp 155, 162.

Appellants attempt to distinguish such cases as *Gray v. American Radiator and Standard Sanitary Corporation,* 76 NE 2d 761 (Ill. 1961), from the instant case on the basis that they involve situations where products were issued into the "stream of commerce and could be reasonably

expected to enter foreign jurisdiction." While the defendants-appellants are not selling a product, they are selling a service. This service, as noted by the learned Michigan trial judge, is of such a nature that it:

> ". . . requires them to have the care and custody of the products and possessions of residents of other states. It is foreseeable that their negligent handling of these products and possessions may have tortious consequences in other states" (Opinion p. 2).

The defendants-appellants have taken voluntary action calculated to have an effect in the forum state. The transportation of food must be carefully done. Spoliation of food innocently purchased and eaten has resulted in grave and serious and severe injuries. These services cannot be performed nonchalantly. If the appellants have caused injuries to occur because of the manner in which their services were performed, they should be expected to answer for the consequences in the state where these "consequences" occurred. For this reason, Michigan courts should have the authority to exercise jurisdiction over the defendants-appellants.

## II. THE IMPOSITION OF IN PERSONAM JURISDICTION OVER APPELLANTS DOES NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF ARTICLE I, SEC. 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

The final argument made by the defendants-appellants presents the question of the application of the Michigan "long arm statute" and the effect it would have on interstate commerce.

The defendants-appellants acknowledge willingly in their Brief that no undue burden is placed upon interstate com-

merce by subjecting foreign manufacturers of *products* to the jurisdiction of state courts wherein it is probable that the product would enter such a state once it has been entered into the stream of commerce. They then attempt to exclude themselves because they deal in services and not products. They further state that since these services have not entered the State of Michigan, the courts of Michigan cannot exercise jurisdiction over them.

However, the fact that a foreign corporation deals in services does not guarantee that their services will never cause harm or injury to another. Services can be performed negligently, just as products can be manufactured negligently. Once these services are offered into the "stream of commerce", those performing this service must be ready to answer for the improper performance of the service. This is especially true when it is the *shipper* who brings action against a carrier for negligent performance of the service and the consignee—The Kroger Company cross claims against the appellants. Nothing could be more reasonable than to expect that a shipper and consignee would suffer consequences from the negligent performance of services. The shipper should be therefore permitted to sue in its own forum.

Answering for the consequences of what was not done, what should have been done, or what act was done negligently does not impose an undue burden upon commerce.

The following factors distinguish the instant case from *Davis v. Farmers Cooperative Equity Company,* 262 U.S. 312 (1923) where recovery was sought in Minnesota for the loss of grain shipped under a bill of lading issued by the carrier in Kansas for transportation over its line from one point in that State to another:

(1) The transaction was in no way connected with the forum state; (at page 314)

(2) The jurisdiction of Minnesota Courts expressed by statute was asserted, whatever the nature of the cause of action and wherever it may have arisen; (at page 315)

(3) The plaintiff was not a resident of the state (at page 315).

In the instant case, the shipment originated from Michigan; Michigan Courts may not exercise their jurisdiction without regard to the nature of the cause of action and wherever it may have arisen as seen by Mich. Comp. Laws Supp. 1961, §600.715 et seq. The limitations existing as due process requirements are met; finally, the plaintiffs are residents of this State.

The Supreme Court noted in the *Davis* case, *supra,* that the absence of employees of carriers who were required to testify imposed a heavy burden upon carriers, until the Director General issued an order which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it occurred, citing *Alabama & Vicksburg Railroad Company v. Journey,* 257 U.S. 111. (Federal control was in existence at this time.)

The Court then went on to say:

> "The facts recited in the order, to justify its issue, are of general application, in time of peace as well as war." (p. 316)

Thus, the plaintiffs in the instant case would meet the requirements as set out by the *Alabama case, supra.*

The question of whether an undue burden would be imposed upon a corporation is a question of fact which in the instant case was decided in the negative by the trial court. See *Mitsubishi Shojii Kaisha v. Norddentscher-Lloyd* (1938), 169 Misc. 235, 6 N.Y.S. 2d 878.

## CONCLUSION

Wherefore, Appellees—The Kroger Company—respectfully request this Court to grant their Motion to Dismiss for failure of the Appellants to present a substantial constitutional question.

Respectfully submitted,

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